No. 02-359

Supreme Court, U.S.
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In The

Supreme Court of the United States

AUBREY E. HENRY,

Petitioner,

v.

JEFFERSON COUNTY PLANNING COMMISSION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF

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REPLY BRIEF FOR PETITIONER

The Respondents admit there is a conflict amongst the circuits over the property interest issue raised here, arguing against the standard followed in the Third Circuit, the Seventh Circuit, and more recently in the Ninth Circuit. (Opp. pp. 12-16) In order to try to dissuade the Court from addressing this conflict amongst the circuits, however, the Respondents mislead the Court by both misrepresenting the record below and by interjecting peripheral arguments in an attempt to confuse the issue raised here.[1]

The pertinent facts of this case, and the property issue raised, however, are simple and straightforward. According to even the Respondents' statement of facts, the Petitioner, Mr. Henry, owned and operated a commercial restaurant in fee simple from 1979 to 1988 before the Respondent Jefferson County passed a new zoning ordinance. Under the new zoning ordinance, his restaurant became a non-conforming use in the newly defined rural-agricultural district where it was located, and thus was grandfathered in as a nonconforming use. (Opp. pp. 1-2)

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[1] Due to the Respondents' misrepresentation of the record below, the Petitioner has lodged the Brief of Appellant and the Reply Brief in the case below, in the case of *Henry v. The Jefferson County Planning Commission, et al.*, No. 01-1948 (4th Cir., May 7, 2002), with the Clerk of the Court, so the Court can check the accuracy of Respondents' representations with the record below. Where the Petitioner references the Brief of Appellant or the Reply Brief, he is referring to these documents from the lower court, lodged with the Clerk, unless indicated otherwise.

When the restaurant subsequently burned to the ground in 1994, Mr. Henry went to the Director of the Planning and Zoning Commission of Respondent Jefferson County to apply for a permit to rebuild his restaurant. He was informed by the Director of the Planning and Zoning Commission that he should not bother applying for a permit to rebuild his restaurant, because under the new zoning ordinance, there was no provision to rebuild a nonconforming structure that was totally destroyed by fire, and that he would not be able to meet a number of conditions for rebuilding under the new zoning ordinance. Mr. Henry was further told by the Director of Planning and Zoning that he could meet the criteria under an objective point system established in the new zoning ordinance for building townhouses on his property, and the Director of Planning and Zoning suggested he apply for a permit to build townhouses instead of immediately seeking a permit to rebuild his restaurant. He also informed Mr. Henry that once he gained approval for building townhouses, it would be easier for him to gain approval to rebuild his restaurant under the objective point system. (Opp. p. 2)

Based upon this representation of the Director of the Planning and Zoning Commission, Mr. Henry applied for a permit to build 76 townhouses rather than a permit to immediately rebuild his restaurant. (Opp. p. 2) Although Mr. Henry qualified for the permit to build townhouses based upon a favorable score received under the zoning ordinance's objective point system, the permit was denied due to pressure asserted by a large, out of control crowd of protestors, in what could be described as a mob scene, that objected to townhouses being built next to a public park. The protestors feared that children of single parents, and

children from large families, living in the townhouses, would use and play in the public park next to the townhouses. This subjective reason for public opposition directly contradicted the objective point scoring system set forth in the ordinance, which gave the proposed project a more favorable score due to its close proximity to a public park. (Pet. 4-5; Brief of Appellant, p. 40)

Mr. Henry contended the denial violated his substantive due process rights. The district court, however, citing *Gardner v. Baltimore Mayor & City Council*, 969 F.2d 63 (4th Cir. 1992), granted summary judgment against him on this issue, holding he did not have a property interest to challenge the denial of the permit. *Henry v. Jefferson County Planning Commission,* 148 F. Supp. 2d 698, 713-14 (N.D.W.Va. 2001), A-45-46. The U. S. Court of Appeals for the Fourth Circuit affirmed, stating:

> We have made clear that when a "land-use regulation[ ] grant[s] discretion to [government] officials with regard to approval of the proposed development, [a landowner] possess[es] no property interest protected by the Fourteenth Amendment." *Gardner v. City of Baltimore*, 969 F.2d 63, 64 (4th Cir. 1992).

(A-8) The issue presented is thus straightforward:

> Is a landowner seeking a permit entitled to substantive due process protection even when he does not have a "vested right" to the permit?

(Pet. i) In its attempt to avoid addressing this issue, and the sharp split amongst the circuits over this issue, the Respondents start out by grossly misrepresenting the record below, stating: "[Mr. Henry] has not previously raised the issue he attempts to raise in this appeal." (Opp. 7) This representation is patently false. The following

issue was raised and addressed in Mr. Henry's appeal to the U. S. Court of Appeals for the Fourth Circuit:

> Did the district court err in concluding that Mr. Henry was not entitled to due process because he has no property interest?

(Brief of Appellant, p. 2) This issue was then addressed on pages 33-47 of the Brief of Appellant filed in the Fourth Circuit. The respondents further misrepresent: "[N]or did [Henry] advance the theory that ownership of the property by itself, is a sufficient 'property interest' to trigger substantive due process protection in a zoning case." (Opp. 7-8) Contrary to this misrepresentation, Mr. Henry stated the following in his brief submitted to the Fourth Circuit:

> Mr. Henry contends . . . that when he owned the land, and when he (or his family) had been operating a commercial business on the property for twenty (20) years prior to the enactment of the Ordinance, he had a protectable property interest . . . without any additional need to show that he was entitled to the conditional use permit.

(Brief of Appellant, pp. 33-34). The Respondents also make the following misrepresentation about the record below:

> [N]one of Henry's prior briefs before the lower courts ever mentioned this split of authority or advocated the position stated in *DeBlasio*.

(Opp. 7) In truth, Mr. Henry made the following argument to the Fourth Circuit:

> [T]o the extent that there may be a circuit conflict between this circuit, with respect to its rulings in *Gardner v. Baltimore Mayor & City Council*, 969 F.2d 63 (4th Cir. 1992) and *Sylvia Development Corp. v. Calvert County Md.*, 48

> F.3d 810 (4th Cir. 1995), on one side, and the Third Circuit's ruling in the more recent case of *De Blasio v. Zoning Board of Adjustment for Township of West Amwell,* 53 F.3d 592 (3d Cir. 1995), and the Ninth Circuit in the more recent case of *Schneider v. California Department of Corrections*, 151 F.3d 1194 (9th Cir. 1998), on the other side, Mr. Henry suggests this Circuit should re-examine its rulings in *Gardner* and *Sylvia* in light of the U.S. Supreme Court's more recent pronouncements regarding property rights in *Nollan* and *Palazzolo*. . . .

(Reply Brief, p. 14, n. 8) Clearly, Respondents misrepresent the record below. By making these blatantly false statements in their first point asserted in their opposition, the Respondents reveal the weakness of their following arguments.

The Respondents next argue, rather disingenuously, that the instant case does not involve the same property interest issue as the one raised and accepted for argument in *City of Cuyahoga Falls, et al. v. Buckeye Community Hope Foundation, et al.*, No. 01-1269 ("*Buckeye* case"). (Opp. 9) In this regard, Respondents state:

> A review of the Petition for Writ of Certiorari and Brief in Opposition in *Buckeye* shows that neither party in that case asks this Court to examine the propriety of applying *Roth* in this manner in zoning cases involving substantive due process challenges. The appellant in *Buckeye* argues that no property interest exists in the land use permits under *Roth* and *Gardner*, while the Appellee argues that a property interest does exist under *Roth* and that *Gardner* is distinguishable.

(Brief in Opposition, p. 10). This statement makes no sense, as it admits that both sides in *Buckeye* argue whether a property interest exists under *Board of Regents of State Colleges v. Roth,* 408 U.S. 564 (1972). Further, review of the briefs filed with the Court on the merits in *Buckeye* makes clear that it is the same issue. The identical issue is discussed and briefed on pages 29-31 of Petitioners' Brief on the Merits, and on pages 33-38 of the Brief for Respondents, filed with the Court in *Buckeye*. As the respondent in *Buckeye* correctly states in its brief regarding this issue:

> The circuits are clearly split on this issue. This Court can alleviate the confusion by affirming that the "right of [a landowner] to devote [his] land to any legitimate use is properly within the protection of the Constitution." The Court should recognize that ownership of land by itself entitles the landowner to freedom from arbitrary or irrational interference with the use of that land. . . .

(Brief for Respondents, p. 35, *City of Cuyahoga Falls, et al. v. Buckeye Community Hope Foundation, et al.*, No. 01-1269)

The Respondents next go on to argue that this is a poor case to address the property interest issue because even if relief is granted to Mr. Henry, the district court still will not decide in his favor. (Opp. 11-12) This is pure speculation. The Fourth Circuit did not address other parts of the district court's opinion in regard to substantive due process because it determined at the outset that Mr. Henry did not have a property interest under the *Gardner* standard, and therefore had no right to substantive due process. That was the basis for the decision in the Fourth Circuit, and not some other peripheral and

speculative argument that the Respondents seek to interject here for upholding the district court.

Contrary to what Respondents argue, this case presents even a stronger case for the property owner than in *Buckeye*, because in the instant case, Mr. Henry and his family operated a commercial business on the property for twenty (20) years prior to the time the zoning ordinance was enacted that deprived them of the continued use of the land for that business use or other alternative business uses. The Court should perhaps even consider dismissing the granting of the writ of certiorari on this same issue in *Buckeye* as being improvidently granted, and instead grant the petition for a writ of certiorari in the instant case.

In their last point, the Respondents finally address the inter circuit split, but pretend the Third Circuit is the only circuit on the other side of the split from the Fourth Circuit, stating: "The minority position stated in *DeBlasio* has little to recommend to it." (Opp. 13) As Mr. Henry points out in his Petition, however, there is a sharp and clear conflict amongst numerous circuits on this issue, and the Seventh and Ninth Circuits are on the same side of this conflict as the Third Circuit with its *DeBlasio* standard, in sharp contrast to the Second, Fourth, and Eleventh Circuits on the opposite side. (Pet. 9-17)

This sharp split amongst the circuits presents an issue of national importance that cries out to be resolved. The Respondents make no credible argument otherwise.

CONCLUSION

For the reasons stated above, the Court should **GRANT** this petition for writ of certiorari. In the alternative, this case should be placed on **HOLD** for the Court's decision in *Buckeye*, No. 01-1269, certiorari granted June 24, 2002, and scheduled for oral argument on January 21, 2002.

DATED: December 27, 2002.

Respectfully submitted,

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